

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

November 17, 2009

Charles R. Fulbruge III
Clerk

No. 09-60102
Summary Calendar

DAMON FRANKLIN SPENCE,

Petitioner

v.

ERIC H. HOLDER JR., U.S. ATTORNEY GENERAL,

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A39 747 558

Before GARWOOD, SMITH and STEWART, Circuit Judges.

PER CURIAM:*

Damon Franklin Spence petitions this court for review of an order by the Board of Immigration Appeals (BIA) affirming the immigration judge's (IJ) denial of his application for cancellation of removal and removing him from the United States. Spence argues that his New York state convictions for criminal possession of marijuana do not constitute aggravate felonies that rendered him ineligible for cancellation of removal because he was not prosecuted as a

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

recidivist under New York law. He also argues that under the categorical approach espoused by the Supreme Court in *Lopez v. Gonzalez*, 549 U.S. 47 (2006), his convictions of simple possession do not constitute drug trafficking crimes under the Controlled Substances Act (CSA). Spence's arguments are foreclosed by our decision in *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009), *petition for cert. filed* (July 15, 2009) (No. 09-60). Further, his 1998 simple possession conviction was final before his August and December 2007 convictions. *Cf. Smith v. Gonzales*, 468 F.3d 272, 277-78 (5th Cir. 2006) (discussing New York law; offense not final until one-year period for seeking discretionary review had passed).

Accordingly, Spence's petition for review is DENIED.